BRITANIA BRANDS (MALAYSIA) SDN BHD A

v.

KETUA PENGARAH BURUH, MALAYSIA & ANOR

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG LAM KIAT JC
[SUIT NO: (MT-1) 25-8-2003]
10 OCTOBER 2008

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash order of Director General of Labour allowing 2nd respondent's claim for termination benefits - Natural justice and procedural fairness - Refusal to grant adjournment - Absence of counsel - Computation of interest - Whether order a nullity - Employment Act 1955, s. 69* C

LABOUR LAW: *Employment - Termination benefits - Application for order of certiorari to quash order of Director General of Labour allowing 2nd respondent's claim for termination benefits - Natural justice and procedural fairness - Refusal to grant adjournment - Absence of counsel - Computation of interest - Whether order a nullity - Employment Act 1955, s. 69* D E

This was an application by the applicant for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of the Director General of Labour ('1st respondent') pursuant to s. 69 of the Employment Act 1955 ('Act') allowing the 2nd respondent's claim for termination benefits. This application was founded on two main grounds: (i) that the 1st respondent had acted in breach of natural justice and procedural fairness when the Assistant Director of Labour In Charge ('ADL') rejected the applicant's request for an adjournment in order to appoint an advocate to represent the applicant for the purpose of the hearing, and proceeded with the hearing on the same day; and (ii) that the 1st respondent had committed several substantive errors of law and acted without or in excess of his jurisdiction when the ADL ruled that the applicant was liable to pay termination benefits to the 2nd respondent. F G H

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Held (allowing the application):

(1) The discretion to adjourn a case must be exercised on sound principles so as not to cause a miscarriage of justice. In this instance, the ADL did not exercise his discretion correctly when he refused to grant an adjournment and proceeded with the hearing of the inquiry in the absence of the applicant's counsel; this amounted to a restriction on the common law right of the applicant to appear and be heard through counsel. For this reason, the ADL's order could not stand. In addition, the ADL's order dated 15 November 2002 prescribing for the computation of interest to commence on 14 October 2002 was in contravention of s. 69(3A) of the Act. This order, being a nullity, also could not stand. For the aforesaid reasons, the 1st respondent's decision ought to be set aside. (paras 23 & 31)

[1st respondent to conduct a fresh inquiry into 2nd respondent's complaint before another labour officer.]

Case(s) referred to:

Austral Amalgamated Tin Bhd & Another Appeal v. Abdul Wahab bin Kopon & Ors & Another Appeal [2004] 2 CLJ 316 CA ***(refd)***

Bushell v. Secretary of State for the Environment [1981] AC 75 ***(refd)***

Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong [1998] 3 ILR 843 ***(refd)***

Deputy Chief Police Officer, Perak & Anor v. Ramesh Thangaraju [2001] 1 CLJ 245 CA ***(refd)***

Doresamy v. Public Services Commission [1971] 1 LNS 28 ***(refd)***

Dunlop Industries Employees Union v. Dunlop (M) Industries Bhd & Anor [1987] 1 CLJ 232; [1987] CLJ (Rep) 86 SC ***(refd)***

Esso Production Malaysia Inc v. Aladdin Mohd Hashim [2000] 3 CLJ 334 CA ***(refd)***

Estet Pekebun Kecil Sdn Bhd v. Thomas Rajan [1991] 2 ILR 1028 ***(refd)***

Federal Hotel Sdn Bhd v. National Union Of Hotel Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC ***(refd)***

Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor [2000] 2 WLR 870 ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

Rohana Ariffin v. Universiti Sains Malaysia [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***
Sime Surveillance Sdn Bhd v. Abu Bakar Hj Mahmood (Rayuan Sivil No: R2-16-9-1999) (Unreported) ***(refd)***
Soonfroze Corporation Sdn Bhd v. Siti Salabiah Chek Hassan & Ors [2003] 6 CLJ 97 HC ***(refd)***
Syarikat Emastulin Automobil Sdn Bhd v. Kathereson Subramaniam & Lai Kow [1988] 1 ILR 311 ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Worker's Union [1995] 1 ILR 199 ***(refd)***
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***
YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 2, 69(3A), 70
Employment (Termination & Lay-Off Benefits) Regulations 1980, regs. 3, 4(1)(a)
Evidence Act 1950, s. 101
Rules of the High Court 1980, O. 53

Other source(s) referred to:
Harvey, *Industrial Relations and Employment Law,* para 259

For the plaintiff - Raymond Low; M/s Shearn Delamore & Co
For the 1st respondent - Azizah Nawawi SFC

Reported by Suresh Nathan

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] This is an application for judicial review (encl. 8) under O. 53 of the Rules of the High Court 1980 ('RHC') for an order of *certiorari* to quash the decision of the Director General of Labour (1st respondent) made on 12 November 2002 pursuant to s. 69 Employment Act 1955 ('the Act'). Leave for the said application was obtained on 7 October 2003.

Brief Account Of The Facts

[2] The 2nd respondent commenced employment with the applicant on 21 October 1963 as a general worker. No letter of appointment was issued to her. However, the 2nd respondent being a unionised worker came under the terms of the collective agreement. On 1 January 1985 the 2nd respondent was promoted to the position of assistant supervisor. On 25 March 2002 the applicant issued a letter to the 2nd respondent informing of her upcoming retirement on 28 May 2002 being the date when she attains the age of 55 years. The 2nd respondent remained in the employment of the applicant until 28 May 2002.

[3] Subsequently, the applicant received a summons dated 13 August 2002 from the 1st respondent notifying of a claim by the 2nd respondent for termination benefits of RM32,959.40. On 28 August 2002 the applicant and the 2nd respondent appeared at the 1st respondent's office for the hearing. A labour officer one Encik Anuar advised both parties to settle the matter amicably and the matter was adjourned to a date to be fixed. By a letter dated 2 September 2002 the 1st respondent informed the applicant that the matter was fixed for continued hearing on 3 October 2002. On 3 October 2002 the applicant appeared at the labour office but was informed that the hearing had been postponed because the labour officer in charge was attending a course. By a letter dated 15 October 2002 the applicant was informed of the next continued hearing date on 6 November 2002. Owing to the fact that 6 November 2002 was a public holiday the continued hearing was rescheduled to 12 November 2002.

[4] Meanwhile, on 26 October 2002 three Chinese daily newspapers carried reports stating that the 2nd respondent had lodged a complaint with the Malaysian Chinese Association ('MCA') about the applicant's failure to pay her termination benefits. Subsequently on 17 November 2002, a report in a Chinese daily newspaper featured the 2nd respondent together with the Minister of Human Resources and the Member of Parliament for Tambatan, Johor. The Minister was reported to have said that he will assist the 2nd respondent to recover her deserved welfare benefits and that he agreed to look into the matter and contact the factory and that he is confident that he will be able to settle the matter. That report carried a photograph of the Minister shaking hands with the 2nd respondent in the presence of the MCA representative.

[5] On 12 November 2002 the applicant's Assistant Human Resources Manager ('Liew') appeared at the labour office. The Assistant Director of Labour in charge ('ADL') called both parties into his room enquiring about whether a settlement had been reached. After being informed that no settlement had been reached the ADL informed the parties that he would proceed with the hearing of the complaint. Liew then requested for an adjournment in order for the applicant to obtain legal representation. The ADL rejected the request and proceeded with the hearing. The 2nd respondent was examined on oath. The ADL then directed Liew to give evidence on oath. At the conclusion of the hearing the ADL allowed the 2nd respondent's claim. By a letter to the applicant dated 14 November 2002 the 1st respondent enclosed a copy of the order dated 15 November 2002 which ordered the applicant to pay to the 2nd respondent termination benefits in the sum of RM32,959.40 together with interest at the rate of 8% per annum with effect from 14 October 2002 until full settlement.

Principles Of Judicial Review

[6] At the outset it is important to note that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the jurisdiction and not in its appellate jurisdiction (*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of *certiorari* where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) that body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether *certiorari* will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made *ultra vires*, unfairly or unjustly in the exercise of the discretion.

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Grounds Of Application

[7] This application is founded on two main grounds:

(a) That the 1st respondent had acted in breach of natural justice and procedural fairness when the ADL rejected the applicant's request for an adjournment in order to appoint an advocate to represent the applicant for the purpose of the hearing and proceeded with the hearing on the same day; and

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(b) That the 1st respondent had committed several substantive errors of law and acted without or in excess of his jurisdiction when the ADL ruled that the applicant was liable to pay termination benefits to the 2nd respondent.

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The following affidavits were filed in relation to this application;

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(1) Applicant's affidavit affirmed on 5 December 2002. ... (encl. 4)

(2) Applicant's further affidavit affirmed on 7 November 2003 ... (encl. 9)

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(3) Respondent's affidavit in reply affirmed on 26 October 2004. ... (encl. 14)

(4) Respondent's affidavit in reply affirmed on 27 October 2004. ... (encl. 15)

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(5) Applicant's affidavit in reply affirmed on 4 February 2005. ... (encl. 18)

Applicant's Submission

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[8] In regard to the first ground, learned counsel for the applicant submitted that the labour officer conducting the inquiry under s. 70 of the Act is a public decision maker exercising quasi-judicial powers under the Act. Therefore he has a duty to act fairly and in accordance with the rules of natural justice and procedural fairness. The outright refusal to grant an adjournment at the hearing of the inquiry constitutes a blatant breach of the rules of natural justice and procedural fairness (*Federal Hotel Sdn Bhd v. National Union Of Hotel Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150; *Esso Production Malaysia Inc v. Aladdin Mohd Hashim* [2000] 3 CLJ 334 during which attempts at

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conciliation were made, it is the practice of the labour department to conduct conciliation meetings even though the letters of notification may state that the matter is set down for hearing ('perbicaraan'). The applicant accordingly understood that the purpose of the hearing on 12 November 2002 was to facilitate further conciliation attempts.

[9] Learned counsel submitted that firstly, that was the first time the applicant had applied for an adjournment. Secondly, Liew, the applicant's representative had appeared at the labour office for the purpose of conciliation and not for the hearing. The applicant did not have the opportunity to prepare the bundle of documents or the applicant's submission. The applicant was also denied the opportunity to cross-examine the 2nd respondent effectively with the benefit of counsel (*Bushell v. Secretary of State for the Environment* [1981] AC 75). Thirdly, the ADL, conducting the inquiry did not give any reason for his refusal in allowing the applicant to be legally represented.

[10] It was also submitted that during the hearing of the inquiry the ADL remarked that the applicant was practising double standards. Liew, the applicant's representative was also compelled to appear in the witness box to be cross-examined by the ADL himself without affording Liew to be re-examined. The applicant's ability to present its case was thereby restricted (*Rohana Ariffin v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390).

[11] Learned counsel then submitted that there was also a likelihood of bias on the part of the ADL. He referred to the reports in three Chinese daily newspapers. The Labour Department comes under the purview of the Ministry of Human Resources. The Minister had in his affidavit denied that he had actively espoused the 2nd respondent's claim. However, no explanation was given as to why the Minister had attended the meeting and shook hands with the 2nd respondent; nor did the Minister deny the contents of the Chinese daily newspapers.

[12] Learned counsel submitted that in all the aforesaid circumstances the manner in which the inquiry was conducted was tainted with likelihood of bias, breach of natural justice and procedural fairness. The decision dated 12 November 2002 of the ADL a public decision maker is susceptible to challenge where

there is a jurisdictional error arising from a breach of natural justice (*YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471).

[13] In regard to the second ground, learned counsel submitted that the decision made on 12 November 2002 is tainted with several material flaws and errors of law. The 2nd respondent's claim for termination benefits come under reg. 3 of the Employment (Termination & Lay-Off Benefits) Regulations 1980 ('the regulations'). The ADL erred in law when he failed to appreciate that the said claim fell within one of the exceptions under reg. 4(1)(a) of the regulations. As a unionised employee the 2nd respondent's retirement age is 55 years as provided for under the collective agreement. The implied term on the retirement age continued to apply when the 2nd respondent was promoted to Assistant Supervisor (s. 2 Employment Act 1955; *Sime Surveillance Sdn Bhd v. Abu Bakar Haji Mahmood* (Rayuan Sivil No. R2-16-9-1999)). The general rule in the Malaysian context is that the retirement age is set at 55 years of age (*Syarikat Emastulin Automobil Sdn Bhd v. Kathereson a/l Subramaniam & Lai Kow* [1988] 1 ILR 311; *Estet Pekebun Kecil Sdn Bhd v. Thomas Rajan* [1991] 2 ILR 1028; *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong* [1998] 3 ILR 843; Harvey on *Industrial Relations and Employment Law* para. 259).

[14] Learned counsel also submitted the said decision made on 12 November 2002 is bad in law because it ordered for the payment of interest at the rate of 8% per annum with effect from 14 October 2002. This is in breach of s. 69(3A) of the Act which provides that interest payable is to be calculated commencing on the thirty-first day from the date of the making of the order until the order is satisfied. This constitutes a serious jurisdictional error making the said decision a nullity.

1st Respondent's Submission

[15] In reply to the issues under the first ground learned Senior Federal Counsel ('SFC') for the 1st respondent submitted that there is no right to counsel during the inquiry under s. 69 of the Act. The procedure regulating the conduct of the inquiry is stipulated in s. 70 of the Act. Section 70 provides that the 1st respondent shall issue a summons to the applicant (i) giving notice

of the nature of the complaint, (ii) informing of the date, time and venue at which the applicant may bring any witness. Witnesses summoned shall be examined on oath or affirmation by the 1st respondent. If the person summoned fails to appear at the inquiry the 1st respondent may hear and decide the complaint notwithstanding that the person's interest may be prejudiced by the decision (s. 70(d), (g) and (h) RTA). There is nothing in s. 70 that requires or entitles the applicant to have access to counsel during the inquiry. Therefore the 1st respondent cannot be said to have deprived the applicant of procedural fairness by not allowing the applicant's request for an adjournment (*Nordin Hj. Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777).

[16] It was also submitted by SFC that the Act is a social legislation and an inquiry before the 1st respondent under s. 69 is only an inquiry between an employee and his employer. The inquiry is not a court proceeding and should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedures that are applied in a court of law (*Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314; *Austral Amalgamated Tin Bhd & Another Appeal v. Abdul Wahab bin Kopon & Ors & Another Appeal* [2004] 2 CLJ 316; *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 1 ILR 199). As there is no legal requirement for legal representation before the inquiry, the same cannot be made to be the basis for an application for an adjournment. Accordingly, SFC submitted that the refusal, if any, to grant the adjournment on the ground of access to counsel cannot be the basis to quash the decision made on 12 November 2002. SFC pointed out that the ADL had in his affidavit denied that Liew made a formal application during the inquiry for an adjournment to obtain legal representation. However, the ADL admitted that Liew did say to him that the applicant wanted to engage a counsel.

[17] Assuming that Liew's assertions are true, SFC submitted that the ADL was correct in rejecting the request for an adjournment. In the first place the applicant had no legal right to counsel in the inquiry proceedings. Secondly, to allow the

applicant to be represented by counsel would not be fair to the 2nd respondent. Thirdly, the applicant was represented by its Assistant Manager for Human Resources and not any ordinary officer. Finally, the objective of the inquiry is meant to be simple, cheap and fast (*Dunlop Industries Employees Union v. Dunlop (M) Industries Bhd & Anor* [1987] 1 CLJ 232; [1987] CLJ (Rep) 86; *Deputy Chief Police Officer, Perak & Anor v. Ramesh a/l Thangaraju* [2001] 1 CLJ 245) SFC further submitted that according to the notes of proceedings both parties were given the right to be heard and the opportunity to cross-examine the witnesses during the inquiry. Therefore the ADL did not offend the rules of natural justice or procedural fairness in the conduct of the inquiry on 12 November 2002.

[18] In reply to the issue of likelihood of bias on the part of the ADL, SFC submitted that both the ADL and the Minister had denied the applicant's allegation. The applicant had failed to prove that there is a real danger of bias on the part of the ADL. A mere allegation of a likelihood of bias is not enough (*Mohamad Ezam bin Mohd Nor & Ors v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309).

[19] In regard to the second ground SFC submitted the onus is upon the applicant to prove that the retirement age is 55 years was an implied term (s. 101 Evidence Act 1950). The ADL found that "Tiada perjanjian perkhidmatan secara bertulis menggambarkan tidak ada umur persaraan bagi kes pengadu ini. Pihak defendan hanya memberi keterangan melalui saksi bahawa umur persaraan adalah 55 tahun sebagaimana terpakai kepada pekerja-pekerja yang tertakluk kepada perjanjian bersama tetapi tiada bukti dan saksi yang menyokong keterangan saksi ini." The collective agreement was not produced at the inquiry to confirm that the normal retirement age is 55 years. The applicant cannot assume that all workers know or ought to have known that the retirement age is 55 years. The applicant failed to substantiate their assertion. SFC submitted that the cases cited by the applicant are distinguishable. In those cases the evidence of both the practice and policy of the employers in question were taken into account SFC also submitted that in exercising its power of judicial review the courts must be slow in interfering with the finding of fact by the inquiry tribunal (*Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9).

Finding Of The Court

[20] The issues that fall to be determined under the first ground is (1) whether there is any right to counsel in an inquiry conducted pursuant to s. 69 of the Act, and (2) whether there is a likelihood of bias on the part of the ADL. In regard to the first issue, the applicant's complaint is that their application for an adjournment in order to obtain legal representation was denied outright. Consequently, the applicant's ability to present its case was restricted. There is no provision in the Act for legal representation in the conduct of an inquiry. The regulations is also silent on the right to assistance of counsel. By the same token, however, there is also nothing in the Act or the regulations to exclude legal representation. In the circumstances can it be said that the applicant have been deprived of the right to the assistance of counsel? It has been recognised and accepted by the courts that in the absence of any express provision to the contrary the common law right of a person to appear and be heard through counsel cannot be restricted or taken away.

[21] This fundamental principle was enunciated in *Doresamy v. Public Services Commission* [1971] 2 MLJ 127. In that case an officer appealed to the appeal board against his dismissal from service by the disciplinary board. The appeal was submitted by a solicitor on his behalf. The appeal board rejected the appeal on the ground that the appeal was not made by him but by his solicitor. The regulation in question was silent on the right to assistance of counsel. The High Court accepted that the common law right of legal representation can be restricted either by express words in a statute or by necessary implication. Raja Azlan Shah J (as His Royal Highness then was) observed at p. 129:

> On appeal Deane J, held that the common law right to appear and be heard through an agent cannot be restricted in the absence of an expressed provision restricting or taking away that right. The learned judge referred to the case of *R v. Assessment Committee of Saint Mary Abbotts, Kensington* in which Charles J had to decide on the question whether a person exercising the statutory right of objecting could appear by an agent: the learned judge quoted a passage of Stirling J in *Jackson & Co. v. Napper:*

> I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. Of course, the legislature may do so; but *prima facie* where there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose.

And at p 130:

> Now this question must be posed: if he has a statutory right of appeal why cannot his solicitor appear on his behalf? The regulation is silent on the right to the assistance of counsel. Is that adequate to deprive the aggrieved person of the right to the assistance of counsel? I think not. The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from regulation 13(1) to limit his right.

[22] The application for an adjournment was made because the applicant wanted to be represented by counsel. That the application for an adjournment was in fact made is cannot be denied given the ADL's admission in the ADL's affidavit (para. 9 in encl. 15) as follows:

> 9. Seterusnya, bagi menjawab pengataan di perenggan 27, 28 dan 29 Afidavit Pemohon, saya ingin menegaskan bahawa semasa di dalam Kamar/bilik Pegawai, Wakil Pemohon ada menyuarakan pandangan beliau untuk melantik peguam bagi mewakili Pemohon. Saya telah memaklumkan bahawa kes ini telah ditetapkan untuk perbicaraan dan beliau sepatutnya melantik peguam sebelum tarikh perbicaraan. Justeru itu, perkara ini tidak direkodkan dalam Nota Keterangan kerana perkara ini merupakan sebahagian daripada tidak rasmi dalam kamar/bilik pegawai. (emphasis added)

The question then is whether the ADL had correctly exercised his discretion in refusing to grant an adjournment sought by the applicant. At the first hearing on 28 February 2002 the parties were advised to resolve the matter amicably. The second hearing on 3 October 2002 was adjourned because the ADL was away on course. The third hearing on 6 November 2002 was also adjourned because it fell on a public holiday. The hearing subsequently proceeded on 12 November 2002. On the facts it is plain that the hearing on 12 November 2002 was effectively the first time the hearing of the inquiry was set down. On the previous three occasions the hearing did not proceed for a variety of reasons. There was only one application for an adjournment and it was made on the first hearing date.

[23] The general principles relating to the postponement of cases has been enunciated comprehensively in *Soonfroze Corporation Sdn Bhd v. Siti Salabiah Chek Hassan & Ors* [2003] 6 CLJ 97. It is in the absolute discretion of the court or tribunal to decide whether to grant an application for the postponement of a case already set down for hearing. All cases fixed for hearing should proceed with all convenient speed and without having to be adjourned on flimsy grounds. However, if there is an application for adjournment, the court must look at the material facts and grounds of the application in order to exercise its discretion correctly. A refusal to grant an adjournment can constitute a failure to give a party the opportunity of adequately presenting his case. Discretion must be exercised based on sound principles so as not to cause a miscarriage of justice. In the present case the ADL had erred when (1) he took the view that the application for an adjournment was made informally, (2) he failed to take into consideration the previous three occasions when the hearing was postponed through no fault of the applicant, and (3) he ignored the reason advanced by the applicant as a right consideration and valid ground for the adjournment. The ADL had not exercised his discretion correctly when he proceeded with the hearing of the inquiry in the absence of the applicant's counsel; this amounted to a restriction on the common law right of the applicant to appear and be heard through counsel. For this reason the order of the ADL cannot stand.

[24] In *Nordin Hj. Zakaria, supra,* the respondent a police officer was dismissed from the Royal Malaysia Police after he was found guilty pursuant to disciplinary proceedings initiated by the Deputy Chief Police Officer, Kelantan ('DCPO'). His suit at the High Court against the DCPO was dismissed. On appeal the Court of Appeal held that there was procedural unfairness in the disciplinary proceedings chiefly because the DCPO did not inform the police officer, before the commencement of the proceedings that he could be punished with dismissal or a reduction in rank if he were to be found guilty. One of the issues of law before the Federal Court was whether the disciplinary authority is required to inform a junior officer of the possible consequences on a finding of guilty. The Federal Court held that the respondent could not be said to have been deprived of procedural fairness by not being informed as there is nothing in the regulations in question that requires or entitles the respondent to be informed. As *Nordin Hj. Zakaria, supra* deals with the question of whether a public servant facing dismissal should have a right to be informed of the possible consequences prior to the hearing of the disciplinary proceedings, it is inapplicable to the present case. Accordingly, this case is of no aid to the 1st respondent's contention that the 1st respondent cannot be said to have deprived the applicant of procedural fairness by not allowing the applicant's request for an adjournment.

[25] The second issue relates to whether there is a likelihood of bias on the part of the ADL. The rest to be applied in determining whether there is a likelihood of bias is the 'real danger of bias' test as propounded by the Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701. Mohamed Dzaiddin Chief Justice delivering the judgment of the Federal Court said at p 706:

> Having considered the authorities cited and their reasonings, we would follow *Gough* which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the *habeas corpus* application involving the appellants?

At p 705 the real danger test is described in the following manner: A

> In England, the courts applied the 'real danger' of bias test in a criminal case. In *R v. Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicion test. Lord Goff, after examining the authorities in detail, reformulated the real danger test as follows (at p 670): B
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> > [Having] ascertained the relevant circumstances, the court should ask itself whether, having regard to the circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, *in the sense that he might unfairly regard (or have unfairfy regarded) with favour, or disfavour, the case of a party to the issue under consideration.* (Emphasis added) C

[26] Whether there was a real danger of bias or not will depend upon the facts which may include the nature of the issue to be D decided. Every application must be decided on the facts and circumstances of each individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. Recognising that it would be E dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias the Court of Appeal in *Locabail (U.K.) Ltd v. Bayfield Properties Ltd & Anor* [2000] 2 WLR 870 set out at p. 888 a number of instances in which a real danger of bias might well be thought to arise: F

> By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could G be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any H later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* [1989] 167 CLR 568); or if, for any other reason, there were real ground for doubting the I

A ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

B **[27]** Applying the observations set out in the authorities cited above to the present case the two factors alleged by the applicant to give rise to a real danger of bias are: (i) in the course of the hearing the ADL remarked that the applicant is practising double standards, and (ii) the reports in the Chinese daily newspapers. Firstly, the ADL has categorically denied making the alleged C remarks. He said that he decided the matter on the basis of the facts adduced. In this regard the mere fact that the ADL had commented adversely on the applicant would not without more found a sustainable objection. The views expressed by the ADL were not in the circumstances, in such extreme or unbalanced terms as to throw doubt on his ability to try the issue objectively. D Secondly, the reports in the Chinese daily newspapers on 26 October 2002 merely highlighted the 2nd respondent's plight. The report on 17 November 2002 featuring the Minister and the 2nd respondent was published after the date of the decision. These E factors are tenuous because the reports are all in Chinese and there is nothing to show that the ADL could read Chinese or was aware of the reports. Secondly, the factor that the ADL comes under the purview of the Minister is also groundless as the report featuring the Minister and the 2nd respondent came out only after F the decision of the ADL was made five days earlier. In the circumstances it could not be said that owing to the said reports the ADL might have unfairly regarded with disfavour the applicant's case. The court is not convinced that there is any likelihood of bias on the part of the ADL

G **[28]** The second ground is founded upon the premise that the 1st respondent had committed several substantive errors of law and acted without or in excess of his jurisdiction. The two pertinent issues are: (1) whether there was an implied term that the retirement age is 55 years and if so, whether the 2nd H respondent's claim falls within the exception in para. (a) in reg. 4(1) of the Regulations; (2) whether the order dated 15 November 2002 requiring payment of interest at the rate of 8% per annum with effect from 14 October 2002 is in breach of s. 69(3A) of the Act. The applicant's contention is that the implied term on the I

retirement age continued to apply when the 2nd respondent was promoted. Further it was contended that the general rule in the Malaysian context is that the retirement age is 55 years. In *Sime Surveillance, supra* there was evidence before the court of the practice and policy of the employer to retire employees at the age of 60 years. In *Syarikat Emastulin Automobil, supra* there was also direct evidence of the policies on the retirement age. In *Estet Pekebun Kecil Sdn Bhd, supra,* the court's finding on the retirement age was based on the documentary evidence. And in *Colgate Palmolive (M) Sdn Bhd, supra,* the court's findings were based on the collective agreement and the Human Resources department personnel procedures and guidelines which were tendered in court. The aforesaid cases are distinguishable on the facts. In the present case the collective agreement was not tendered and no other evidence whatsoever was tendered by the applicant; there was only Liew's bare assertion. The applicant's contention that the retirement age of 55 years is implied is therefore unsupported and unsubstantiated. In consequence, the 2nd respondent's claim is not precluded by the exception in para. (a) in reg. 4(1).

[29] The second issue relates to the validity of the order requiring payment of interest calculated from 14 October 2002 until satisfaction. The applicant contended that in making the order to pay interest retrospectively from 14 October 2002 (one month before the date of the decision dated 15 November 2002) the ADL committed an error of law. The applicable law in question is s. 69(3A) of the Act which reads as follows:

> (3A) An order made by the Director General for the payment of money under this section shall carry interest at the rate of 8 per centum per annum, or at such other rate not exceeding 8 per centum per annum as the Director General may direct, the interest to be calculated commencing on the thirty-first day from the day of the making of the order until the day of the order is satisfied:
>
> Provided that the Director General, on an application by an employer made within 30 days from the date of the making of the order, if he is satisfied that special circumstances exist, may determine any other date from which the interest is to be calculated.

[30] According to s. 69(3A) of the Act the interest payable under s. 69 shall be calculated with effect from the thirty-first day from the date of the order until satisfaction. In the present case the date of the order is 15 November 2002 and the thirty-first day would fall on 14 December 2002. Therefore, in accordance with s. 69(3A) the interest shall be calculated from 14 December 2002 until the date of the order is satisfied. However, the order of the ADL dated 15 November 2002 states that"... faedah atas kadar 8% setahun hendaklah dikenakan keatas semua bayaran tertunggak dan faedah itu dikira mulai 14 Oktober 2002 sehingga penyelesaian penuh." There was no submission in reply by SFC on this issue. In his affidavit in reply, however, the ADL stated that the date '14 Oktober 2002' is a typing error and that the correct date is the date of the decision. Even if the commencement date is the date of the decision (15 December 2002) it would taint the order with illegality because in accordance with s. 69(3A) of the Act, the commencement date shall fall on 14 December 2002. Consequently, the ADL's assertion that the correct date is the date of the decision runs foul of s. 69(3A) of the Act. Furthermore, there was no evidence that the 1st respondent had taken any steps to rectify the error. There is no evidence of a revised or amended order being issued in place of the defective order. Indeed, the order exhibited by the 1st respondent *vide* exh. YH1 is the same order with the commencement date stated as '14 Oktober 2002'. An order made under s. 69 of the Act must comply with the clear statutory provisions relating thereto. Section 69(3A) of the Act is clear and unambiguous as to when the calculation of the interest shall be computed. In the circumstances the order is in excess of jurisdiction being in clear violation of s. 69(3A) of the Act. The order is therefore tainted with illegality and is a nullity.

[31] In summing up, it is the finding of the court that the applicant has the common law right to appear and be heard through counsel at the hearing of the inquiry. The ADL had wrongly exercised his discretion in refusing to grant an adjournment and in so doing had also thereby restricted the applicant's common law right to present its case through counsel. For that reason the ADL's order cannot stand. In addition, the ADL's order dated 15 November 2002 prescribing for the computation of interest to commence on 14 October 2002 is in

contravention of s. 69(3A) of the Act. The order being a nullity also cannot stand. For the reasons aforesaid it is hereby ordered that (1) the decision of the 1st respondent dated 12 November 2002 be set aside, (2) the 1st respondent conduct a fresh inquiry into the 2nd respondent's complaint before another labour officer, and (3) costs as prayed.

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